No. 79-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

ANN MITCHELL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In a number of respects, petitioners' statement of the case distorts the facts. Respondent therefore presents this statement to give the Court a more accurate view.

Respondent Ann Mitchell was employed as a high school teacher of Spanish during the 1971-72 school year by Pickens County (South Carolina) School District "A". In February 1972, she signed a letter of intent stating her desire for renewal of her contract for the following

school year. In April 1972, she discovered that she was pregnant, and so informed the principal of her school. She told the principal that she still desired renewal of her contract, but would need approximately 6 weeks' leave beginning in November to have her baby. Although the principal was agreeable to this arrangement, and a suitable substitute teacher was found who was willing to replace respondent for the period of her absence, the Board of Trustees of the School District refused to renew her contract. It is undisputed that respondent was an excellent teacher, and the sole reason for the nonrenewal was her pregnancy.

At the time of these events, the School District's policy manual contained the following provision:

> The Principal of the school shall decide when the persence of a pregnant woman (teacher, student, or employee) is detrimental to the satisfactory operation of the school program. In all cases of maternity, women who are under contract with the Board of Trustees must in writing apply to the principal of the school or immediate superior official for termination of contract as soon as pregnancy is determined. This termination should take effect not less than three (3) months prior to the expected delivery date. Exceptions must be ap-approved by the District Superintendent.

The court below found that plaintiff was required by this provision to notify her principal "as soon as pregnancy [was] determined," and it was that early notice that led to the nonrenewal of her contract.[1] Nevertheless, in their

[1] The Court of Appeals wrote:

> While the notification requirement critical to this regulation is literally related to "termination" of ongoing contracts rather than to "non-renewal" of contracts for succeeding years, the duty to notify is literally addressed to any teacher "under contract" who determines she is pregnant. There is no question on the record of its intended application to Mitchell's determination and disclosure of her pregnancy; and of course both she and the board so acted upon it, with the results that gave rise to this litigation. This regulation was revoked by the school board during this litigation.

(Pet. App. 3a.)

petition for certiorari, petitioners contend that respondent was required to disclose her pregnancy not because of the maternity policy quoted above, but because of a separate policy requiring a teacher to notify his or her principal when he or she finds it "necessary" to be "absent from school 'for any reason.'" (Pet. 5-6.) This contention is contrary to the finding of the court of appeals, and was raised for the first time in petitioners' petition for rehearing in the court below. Moreover, even in their petition for rehearing, petitioners conceded that "appellant's subjective reason for giving notice was her reading of the 'pregnancy policy' . . . ." In any event, it was only the maternity policy, and not the general policy cited by petitioners, that required respondent to give notice "as soon as pregnancy is determined," rather than waiting until after she had received a new contract.

Petitioners sought to justify their refusal to grant respondent a new contract on the basis of an "unwritten policy" that no teacher would be given a contract if it was known that the teacher would be unable to work the entire school year. But only pregnant teachers were required, because of the maternity policy, to notify school authorities of their condition as soon as it became known. A teacher who expected to be temporarily absent in the following year for some other medical reason, such as anticipated surgery, would not have to disclose that fact until after a new contract was granted. And once such a teacher was employed, he or she would be entitled to take temporary sick leave without sacrificing his or her job. Thus, as the District Court found, no teacher

had ever previously been denied a new contract because of an anticipated temporary absence of this kind.[2]

The District Court initially held that the policies applied to respondent in this case, while neutral on their face, had the effect of discriminating against pregnant women, and were therefore unlawful under Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976). After this Court decided *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the court reconsidered its original decision and, relying on *Gilbert*, entered judgment for petitioners. Respondent then appealed to the Fourth Circuit.

While the appeal was pending, this Court decided *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), which clarified the holding in *Gilbert*. The Court of Appeals held that *Satty* controlled this case, and that in light of that decision the policies in issue here were, at least *prima facie*, unlawful, unless they could be justified as serving some "business necessity." The court therefore remanded the case to the District Court to consider the "business necessity" issue. The crux of the court's reasoning is found in the following paragraph from its opinion:

> Within the *Satty* analysis, as applied to the facts found by the district court in this case and undisturbed in its judgment before us, the defendants' policy as applied clearly also imposed upon women school teachers a substantial burden that their male counterparts need not suffer. Women teachers alone were required by regulation to give advance notice of any anticipated absence of extended duration during an ensuing year. While it may be factually inferable that any male whose comparable anticipated absence was voluntarily disclosed either by himself or others would similarly have been denied renewal of contract, no official obligation of disclosure was laid upon men, and the record is devoid of evidence that anticipated absences for reasons of physical disability were ever used to deny renewal to men. The policies in combination clearly deprived women, including this plaintiff, of an "employment opportunities"—renewal for another year—and "adversely affect[ed their] status as . . . employee[s]" "because of [their] sex" within the meaning of § 703(a)(2). The policy and its consequences in application are not only indistinguishable in substance from those held violative of § 703(a)(2) in *Satty*, but also from those found *prima facie* violative in *Pennington* v. *Lexington School District 2*, 578 F.2d 546 (4th Cir. 1978), another post-*Satty* decision of this Court.

Pet. App. 9a.

[2] The district court found in its first opinion:

> . . . [T]he other denials [of new contracts] . . . did not involve physical disabilities, but rather the inability of the person to commit himself to an entire school year because he or she anticipated a different job offer or a relocation from the area of employment.

(Pet. App. 8b-9b.)

ARGUMENT

The petition for certiorari seeks to present two questions for review by this Court. The first question is whether, to rebut respondent's *prima facie* showing of discrimination in this case, petitioners must prove that their employment policies were justified by business necessity, as the court below held, or whether, as petitioners contend, they need only "articulate some legitimate nondiscriminatory reason" for those policies. The second question is whether the finding in this case that petitioners' policies had a disparate impact on women was adequately supported by the record, despite the absence of statistical evidence.

Both of these issues are controlled by previous decisions of this Court and were correctly decided below. They do not, therefore, warrant review here.

I.

Petitioners' arguments with respect to the first issue proceed from the erroneous premise that this is a "disparate treatment" case—i.e., that the Court of Appeals found that respondent was intentionally denied employment because of her sex. In fact, however, this is a "disparate impact" case. The court below held that in this case, as in *Satty*, the petitioners' employment policies, while neutral on their face, had the effect of imposing on women greater burdens than on men.[3]

The distinction is explained in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977):

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[3] The Court of Appeals held that the District Court's "first conclusion of a *prima facie* Title VII disparate impact violation was correct." (Pet. App. 8a.) Petitioners incorrectly characterize the District Court's first decision as based on a finding of disparate treatment rather than disparate impact. (Pet. 8 n.9.) In that decision, the District Court concluded that the Board's policies, though not intentionally discriminatory, had disproportionate consequences for women:

> Defendants argue that their actions were not based upon plaintiff's sex, but upon their desire to prevent a known interruption in the teaching and learning process. The Court is impressed with defendants' concerns; and, as stated previously, the Court finds that defendants did not intend to discriminate against the plaintiff because of her sex. However, the pertinent provisions of Title VII have been interpreted to proscribe acts that result in sexual discrimination, whether or not the employer acted in good faith. For example, *Gilbert* v. *General Electric Co.* . . . involved a Title VII attack upon General Electric's employee disability benefits program which excluded pregnancy-related disabilities.
>
> * * * * *
>
> Since pregnancy is a disability possible only among women the "consequence" of General Electric's disability program was a less comprehensive program of employee compensation and benefits for women employees than for men employees. Similarly, defendants' actions in the instant case resulted in the denial of a teaching job to plaintiff solely because of pregnancy.

(Pet. App. 9b-10b.)

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, *e.g.*, *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66.
>
> * * * *
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Compare, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-432, with *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-806. See generally B. Schlei & P. Grossman, Employment Discrimination Law 1-12 (1976); Blumrosen, Strangers in Paradise: *Griggs* v. *Duke Power Co.* and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59 (1972).

In a disparate impact case, the plaintiff must first show that a challenged employment practice "work[s] in fact disproportionately to exclude women from eligibility for employment . . . ." *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971). The plaintiff need not make any showing of discriminatory intent. *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 328. Once the plaintiff has established disproportionate effect, the defendant has the burden of showing a "business necessity" for the challenged practice. *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977). Accordingly, the Court of Appeals

remanded this case to the District Court for a determination of the "business necessity" issue.

Petitioners contend that they may rebut respondent's *prima facie* case by advancing a "legitimate nondiscriminatory reason" for their policy. This standard, however, is relevant only to the determination of *disparate treatment* under Section 703(a)(1) of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1). See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 796, 802 (1973). It has no bearing at all on cases of *disparate impact* under Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2). *Nashville Gas Co.* v. *Satty, supra*, 434 U.S. at 143. When a disparate impact is alleged, the rebuttal of a *prima facie* case requires a showing of "business necessity."

The two tests serve entirely different purposes. In a disparate treatment case, the issue is the employer's motive—i.e., whether the challenged action was based on the employee's race, religion, nationality, or sex, or whether it was motivated by a "legitimate nondiscriminatory reason." See *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). Thus, a *prima facie* case of disparate treatment can be rebutted if the employer can articulate a "legitimate nondiscriminatory reason" for the challenged action. The burden then shifts to the employee to show that this purported reason was a mere pretext. See *McDonnell Douglas Corp.* v. *Green, supra*, 411 U.S. at 804-05.

In a disparate impact case, on the other hand, the employer's motive is irrelevant. The issue is the impact of the challenged employment policy on women or minorities. If the policy is shown to affect such groups disproportionately, it is *prima facie* unlawful, unless it can be justified on the basis of business necessity. See *Dothard* v. *Rawlinson, supra.*

Petitioners assert that there is a conflict between the decision below and decisions of this Court and the Court of Appeals for the District of Columbia Circuit. But the decisions allegedly in conflict with the present one all involved disparate treatment rather than disparate impact. *Board of Trustees of Keene State College* v. *Sweeny*, 439 U.S. 24 (1978); *Furnco Construction Co.* v. *Waters, supra*; *Chalk* v. *Secretary of Labor*, 565 F.2d 764 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 945 (1978). There is no conflict. The Court of Appeals employed the proper standards for cases of disparate impact.

II.

Petitioners contend that the evidence in this case did not establish that the challenged employment policies did in fact have a disproportionate impact on women. This Court, of course, does not normally grant certiorari to review factual issues. In any event, petitioners' contention is without merit.

Although there was no statistical evidence available in this case,[4] the court of appeals concluded that petitioners'

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[4] The reason for the absence of statistical evidence is that no records existed from which such statistical data could be derived. This is made clear in the testimony of the District Superintendent. When asked how often the policy precluding employment of a teacher who anticipates a period of absence for part of the school year had been applied in the past, the Superintendent testified:

> A. Well, to my knowledge this is the first objection to the policy. Perhaps I ought to explain that the initial recommendation for employment comes from the Principal, and the Principal, as far as I know, works these kinds of problems out prior to their coming to my attention.
>
> Q. So if this is the first objection, there must have been other instances, then, when this policy was employed?
>
> A. I'm sure there have been, yes.
>
> Q. How often during the term of a year, on the average, is this policy employed in your school district?
>
> A. Well, this I really have no way of knowing, because the Principals by and large take care of these and many of

purported policy of denying contracts to a teacher who anticipated a temporary absence during the contract year, combined with its policy of requiring pregnant women to disclose their condition as soon as it became known, "would necessarily impact disproportionately upon women." (Pet. App. 7a.) As the court noted, "the record is devoid of evidence that anticipated absences for reasons of physical disability were ever used to deny renewal to men." (Pet. App. 9a.) Even if petitioners' policy would require denial of a contract to a male teacher who voluntarily disclosed that he expected to be absent because of surgery or some other medical occurrence during the contract year, no such disclosure was required by the School District's rules, and in any event, such a situation would be extremely rare. On the other hand, immediate disclosure of pregnancy was required, and pregnancy, of course, is a common occurrence which affects only women. The court's conclusion that these policies had a disparate impact on women is therefore not only correct but self-evident.

Contrary to petitioners' argument, there is no requirement that disparate impact be shown statistically. In *Satty*, for example, disparate impact was inferred, as it was here, from the fact that pregnancy was treated less favorably than other physical disabilities. As the court below observed:

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them never come to my attention. (Deposition of Curtis Sidden, p. 95.)

In light of this testimony, petitioners' assertion that respondent was the only woman ever denied contract renewal because of pregnancy is grossly misleading. While no one knows how often this has occurred in the past, it can only be assumed that it occurred quite frequently. Respondent is merely the first person to challenge the policy. Indeed, the same year that respondent was denied contract renewal, two other female teachers were pregnant and expected their babies in the next school year. These teachers did not apply for renewal—and therefore were not technically denied renewal—but they were clearly ineligible for renewal under petitioners' policies. That is probably why they did not bother to apply.

> "To require statistical proof involving a significant sample of actual applications of a policy to establish its disparate impact would always preclude the claim of a 'first impactee.' Title VII of course cannot be read to yield such a result."

Pet. App. 7a n.7.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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